intent. Just prior to Section 10(c)'s passage, Senator Wirth, the original author of the PEG provisions, stated that through Section 10(c) Congress would "give a very clear signal to the cable companies that, in fact, they can police their own systems". 138 Cong. Rec. S650 (daily ed. Jan. 30, 1992).

Such certification is also justified as a means for cable operators to balance their power under the rule on the one hand, and the 1984 Cable Act's prohibition on cable operators exercising "any editorial control over any public, educational, or governmental use of channel capacity" on the other hand. See Section 611(e) (47 U.S.C. § 531(e)). By requiring a certification from PEG programmers, Congress' purpose is served with less intrusion by the cable operator. Ancillary to permitting such certification, the Commission should make clear that cable operators and local access organizations can require indemnity from program providers (including governments and local access organizations acting as program providers) for breach of the certification. Cable operators need this specification in the rule to indicate that such indemnity provisions do not constitute the exercise of editorial control. 16/ Local access

---

16/ In actions brought by the producers of adult programs on a leased access channel against TWCNY, the plaintiffs

organizations as well may need such indemnification since they may not have immunity for actions they take regarding the channels they administer. 17/

Fourth, the NPRM recognizes that procedures need to be developed to govern disputes between the cable operators and PEG programmers and indicates the Commission's inclination to leave those disputes to be handled at the local level. While TWE agrees with that approach, it suggests that certain limits be put on such local power. As discussed above with respect to leased access, cable operators must be able to rely on the certification of the program providers. However, in some instances, an operator may in good faith come to the conclusion that the certification is inaccurate. Accordingly, when a programmer certifies that its programming does not contain any of the defined material, yet the cable operator finds that it does,

---

claim that representations and warranties clauses and indemnification clauses in contracts are unreasonable in part because they constitute the exercise of editorial control by the operator. Media Ranch, Inc. v. Manhattan Cable Television, Inc., No. 90 Civ. 7218 (S.D.N.Y. filed Nov. 9, 1990); Gay Cable Network, Inc. v. Manhattan Cable Television, Inc., No. 91 Civ. 7450 (S.D.N.Y. filed Nov. 1, 1991).

17/ Furthermore, the Commission should make clear that cable operators can require indemnity from a local access organization or franchise authority that requires cable operators to carry programming from which they may incur liability.

the cable operator's finding should have a presumption of validity. Moreover, programming which the cable operator determines should be prohibited from cablecast under the rule need not be cablecast until the programmer challenges the cable operator's decision and successfully proves that it does not fall within a prohibited category. Finally, cable operators should be given the right to obtain an assurance from the local franchise authority that if the operators reasonably and in good faith determine that PEG programming falls within a prohibited category, they will not be held liable by the local franchise authority for breaching an obligation under their franchises to provide PEG programming.

TWE respectfully submits that the proposed rules regarding PEG programming should read as follows:

> "(e) A cable operator or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system may prohibit the use of any channel capacity on such facilities for any programming that contains obscene material, indecent material as defined in paragraph (a) above, or material soliciting or promoting unlawful conduct."
>
> "(f) A cable operator or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system are authorized to require that public, educational or governmental program providers (including governments or access organizations acting as program providers) (1) certify, by contract or otherwise, that they will not submit programming

that contains obscene material, indecent material as defined in paragraph (a) above, or material soliciting or promoting unlawful conduct, and (2) agree that they will indemnify the cable operator or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system for any liability or expense they may incur in relation to the programming."

"(g) In any dispute brought under paragraphs (e) or (f), there shall be a presumption that the findings of the cable operator regarding programming that contains obscene material, indecent material as defined in paragraph (a) above, or material soliciting or promoting unlawful conduct are reasonable and in good faith unless shown by clear and convincing evidence to the contrary. Any programming that the cable operator, or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system, determines to contain obscene material, indecent material as defined in paragraph (a) above, or material soliciting or promoting unlawful conduct shall not be cablecast until the program provider challenges that determination and there is a final decision by a competent authority that the programming does not fall within one of the prohibited categories set out in paragraph (f)."

"(h) Cable operators are authorized to require local governments or access organizations to indemnify them completely for any liability or expense the cable operators incur as a result of indecent programming being carried on their systems which the local governments or access organizations control."

"(i) A cable operator is authorized to require a franchising authority to provide its assurance that it will not hold the cable operator liable for breaching an obligation under its franchise to provide public, educational and governmental programming if the cable operator in good faith withholds programming because it finds it to be

within one of the prohibited categories set out in paragraph (f)."

III. Obscene Programming on Leased Access and PEG Channels.

Congress in amending Section 612(h) of the 1984 Cable Act appears to provide coextensive power in both the cable operator and the local franchise authority to prohibit programming that is "obscene, or is in conflict with community standards in that it is lewd, lascivious, filthy or indecent or is otherwise unprotected by the Constitution of the United States". Section 612(h), as amended, is inartfully drafted and creates the possibility of situations where the local franchise authority determines that certain programming violates Section 612(h) while the cable operator does not believe that the programming violates Section 612(h). If in fact the franchise authority can order the cable operator not to cablecast such programming, then the cable operator faces possible action against it by the program provider pursuant to 47 U.S.C. Section 532(d) or (e)(1). Therefore, the Commission should authorize the cable operator to require an indemnification from the local franchise authority concerning any liability or expense incurred by the operator because of the action by the franchise authority prohibiting programming from the leased access channels.

With particular reference to "obscene" programming, Congress has opened up cable operators to liability for cablecasting such programming. See 1992 Cable Act § 10(d). This liability, however, places a very high price on the difficult and complicated decision that cable operators must make regarding the ever-troubling question of what is obscene. If a cable operator labors over whether certain material is obscene and in the end decides that it is not, that cable operator, even though it in good faith allowed the material to be cablecast, is nevertheless subject to possible criminal and civil liability regarding programming it did not voluntarily choose to cablecast in the first place. In order to alleviate the unfair exposure that the cable operator now faces if it cablecasts a leased or PEG program that is later determined to be obscene, the Commission should provide the cable operator immunity from state and local law for the cablecast of any obscene programming on leased access or PEG channels.

TWE respectfully submits that the proposed rules be supplemented with the following:

> "(j) Cable operators are authorized to require local franchise authorities to indemnify them completely for any liability or expense the cable operators incur as a result of the franchise authorities prohibiting the cable operators from cablecasting programming pursuant to 47 U.S.C. § 532(h)."

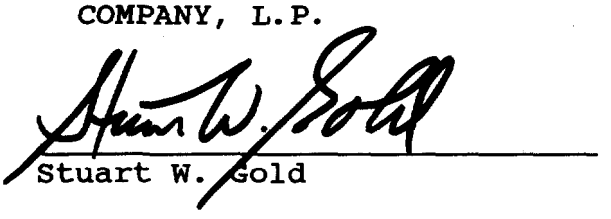
"(k) Cable operators shall not incur any liability under state or local law for any program that involves obscene material which is carried on any channel designated for public, educational, or governmental use or on any other channel obtained under 47 U.S.C. § 532 or under similar arrangements."

Conclusion

With the understanding that TWE has taken a position against its cable systems being forced to carry leased access and PEG programming, TWE has appended hereto recommended rules to implement Section 10 of the 1992 Cable Act and respectfully submits them for the Commission's adoption.

Respectfully submitted,

TIME WARNER ENTERTAINMENT
COMPANY, L.P.



Stuart W. Gold

Cravath, Swaine & Moore
Worldwide Plaza
825 Eighth Avenue
New York, New York 10019
(212) 474-1000
Its Attorneys.

December 7, 1992

APPENDIX

PROPOSED RULES REGARDING INDECENT PROGRAMMING AND OTHER TYPES OF MATERIALS ON CABLE ACCESS CHANNELS

PROPOSED RULES REGARDING INDECENT PROGRAMMING AND OTHER TYPES OF MATERIALS ON CABLE ACCESS CHANNELS

PART 76 -- CABLE TELEVISION SERVICE

1. The authority citation of Part 76 is amended to read as follows:

Authority: Secs. 2, 3, 4, 301, 303, 307, 308, 309, 48 Stat., as amended, 1064, 1065, 1066, 1081, 1082, 1083, 1084, 1085, 47 U.S.C. §§ 152, 153, 154, 301, 303, 307, 308, 309; Secs. 611, 612, __ Stat. ___, 47 U.S.C. §§ 531, 532.

2. Subpart ___ is amended by adding the following new section:

§76.___ Restrictions on Indecent Programming on Leased Access Channels; Restrictions on Obscene Materials and Other Types of Materials on Public, Educational, and Governmental Access.

(a) A cable operator may enforce prospectively a written and published policy of prohibiting on leased access channels programming that the cable operator reasonably believes describes or depicts sexual or excretory activities or organs, in a patently offensive manner, as measured by contemporary community standards for the cable medium, and when judged in the context of the entire program, including the program's overall merit.

(b) All programs intended for carriage on channels designated for commercial leased access use under this section and identified by the program provider as indecent shall be placed on one or more channels designated by the cable operator for indecent programming, except for such programs prohibited by the cable operator pursuant to paragraph (a) above. A cable operator shall block any such channel at least during the times when indecent programming is being carried except for subscribers requesting access to such channel in writing. The cable operator may group time slots to be made available for indecent programming in order to facilitate the administration and the sale of time on these channels without such action constituting the exercise of editorial control subject to 47 U.S.C. § 532(c)(2).

(1) For cable systems that are fully addressable, this paragraph (b) is effective 180 days after publication in the Federal Register.

(2) For cable systems that are not fully addressable, this paragraph (b) shall not apply until the earlier of:

(A) the time at which the cable system is fully addressable; or

(B) 10 years after the effective date of this rule.

(3) In those circumstances where the time requested by the program provider is already under contract, the cable operator shall offer the program provider time available on the channel as close as possible to the time requested. If no other time is available, the cable operator is entitled to refuse to carry the programming on its system until capacity is available for indecent programming, upon further application by the program provider.

(4) In those circumstances where two or more program providers request the same time period on a channel designated for indecent programming, the cable operator can select which program provider will program that time period without such action constituting the exercise of editorial control subject to 47 U.S.C. § 532(c)(2).

(c) Cable operators are authorized to require program providers on leased access channels that lease or otherwise contract for time to certify to cable operators, a reasonable time prior to cablecast determined by the cable operators, that they plan to include indecent material as defined in paragraph (a) above in their programming or that they will not include any indecent material as defined in paragraph (a) above in their programming for the duration of the lease or contract period. Cable operators are also authorized to require program providers to certify in their contracts that they will not include obscene material in their programming. Such certification can be required to be in the contract for time or in some other available manner, at the cable operators' discretion. Cable operators are also authorized to require program providers to indemnify cable operators completely for any liability or expense the cable operators may incur in relation to the programming submitted for cablecast.

(d) The failure to limit indecent programming to a blocked channel as required by this rule shall not subject the cable operator to sanction by the Commission unless it is demonstrated that the operator had received the required written notice from the program provider in a timely fashion.

(e) A cable operator or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system may prohibit the use of any channel capacity on such facilities for any programming that contains obscene material, indecent material as defined in paragraph (a) above, or material soliciting or promoting unlawful conduct.

(f) A cable operator or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system are authorized to require that public, educational or governmental program providers (including governments or access organizations acting as program providers) (1) certify, by contract or otherwise, that they will not submit programming that contains obscene material, indecent material as defined in paragraph (a) above, or material soliciting or promoting unlawful conduct, and (2) agree that they will indemnify the cable operator or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system for any liability or expense they may incur in relation to the programming.

(g) In any dispute brought under paragraphs (e) or (f), there shall be a presumption that the findings of the cable operator regarding programming that contains obscene material, indecent material as defined in paragraph (a) above, or material soliciting or promoting unlawful conduct are reasonable and in good faith unless shown by clear and convincing evidence to the contrary. Any programming that the cable operator, or organization designated in the franchise or by the franchising authority to oversee the operation of public, educational or governmental access facilities on a system, determines to contain obscene material, indecent material as defined in paragraph (a) above, or material soliciting or promoting unlawful conduct shall not be cablecast until the program provider challenges that determination and there is a final decision by a competent

authority that the programming does not fall within one of the prohibited categories set out in paragraph (f).

(h) Cable operators are authorized to require local governments or access organizations to indemnify them completely for any liability or expense the cable operators incur as a result of indecent programming being carried on their systems which the local governments or access organizations control.

(i) A cable operator is authorized to require a franchising authority to provide its assurance that it will not hold the cable operator liable for breaching an obligation under its franchise to provide public, educational and governmental programming if the cable operator in good faith withholds programming because it finds it to be within one of the prohibited categories set out in paragraph (f).

(j) Cable operators are authorized to require local franchise authorities to indemnify them completely for any liability or expense the cable operators incur as a result of the franchise authorities prohibiting the cable operators from cablecasting programming pursuant to 47 U.S.C. § 532(h).

(k) Cable operators shall not incur any liability under state or local law for any program that involves obscene material which is carried on any channel designated for public, educational, or governmental use or on any other channel obtained under 47 U.S.C. § 532 or under similar arrangements.